it is submitted that circumstances such as those mentioned do not permit of any general solution in furtherance of intention. Hence technically the only possible result is that reached in the principal case, of placing the burden of showing an intention to execute the power upon the one benefiting thereby, and preserving the distinction between powers and property.[24] It must be admitted, however, that the contrary rule is a more practical one, as it clearly carries out intention in a greater number of cases.

RIGHT OF WAIVER IN CRIMINAL TRIALS AS GOVERNED BY PUBLIC INTEREST.—It is clearly against the interest of the State to lend its governmental powers and agencies to enforce the decision, on the one hand, of any body constituted not by its laws but by the agreement of the parties, or, in criminal cases, by the prisoner and an agent who has no authority to do so. No agreement, accordingly, providing for an extra-legal tribunal whose judgments shall oust the courts of jurisdiction, will be held binding,[1] and on the same principle the cases almost universally agree in refusing to effectuate the waiver of a privilege or right which is considered to go to the jurisdiction of the court.[2] Thus it has been held that the number of jurors at a criminal trial is a matter to be fixed only by organic law, and that the waiver by the accused of a deficiency of a juror will not confer jurisdiction on a court thus illegally constituted, and preclude an attack on its judgment at any time.[3] But even if the privilege or right in question be not jurisdictional, a waiver will not be permitted if believed to be against that further interest, which, as the cases say, the State has in the lives and liberties of its citizens,[4] and it is doubtless this consideration which has given rise to the greater restriction on waivers in criminal than in civil trials, and in felonies than in misdemeanors.[5] It is recognized, however, that many of the privileges guaranteed both in civil and in criminal cases fall into neither of the foregoing classes, but exist for the benefit of the individual alone, and it is everywhere conceded that such rights as these may be waived at will.[6]

It would seem, however, that no generally accepted definition of the term "jurisdiction" has been attained. Contrary to the decisions referred to above,[7] it has been declared that the right to a jury of twelve

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leigh *v.* Clough (1872) 52 N. H. 267; Hollister *v.* Shaw (1878) 46 Conn. 248; Bilderback *v.* Boyce (1880) 14 S. C. 528; Meeker *v.* Breintnall (1884) 38 N. J. Eq. 345; *contra,* Amory *v.* Meredith *supra;* Stone *v.* Forbes (1905) 189 Mass. 163.

[24]See 11 COLUMBIA LAW REVIEW 663.

[1]Insurance Co. *v.* Morse (1874) 87 U. S. 445.

[2]See Cancemi *v.* People (1858) 18 N. Y. 128; B. & O. R. R. Co. *v.* Polly (Va. 1858) 14 Gratt. 447.

[3]See Cancemi *v.* People *supra;* Cooley, Constitutional Limitations, (7th ed.) 459.

[4]Hopt *v.* Utah (1884) 110 U. S. 574.

[5]See 6 Criminal Law Magazine 182 *et seq.*

[6]6 Criminal Law Magazine 183 *et seq.;* Connors *v.* People (1872) 50 N. Y. 240; Joy *v.* State (1860) 14 Ind. 139, 152; U. S. *v.* Sacramento (1875) 2 Mont. 239; State *v.* Hartley (1895) 22 Nev. 342.

[7]See note 3 *supra.*

is not jurisdictional but is a mere personal privilege;[8] and, indeed, it is well established that the accused may waive his objections to a prejudiced juror,[9] regardless of a guarantee in the State constitution that the jury which is given the right to decide his fate shall be an impartial one.[10] The same conflict of authority is met with when a reversal is asked because of the absence of the judge, by consent, during some part of the trial, especially at the rendition of the verdict;[11] and many of the very courts which deem the presence of the prisoner, in a trial for felony, a condition of jurisdiction,[12] will not permit him to obstruct justice by absconding and then demanding a new trial because the proceedings were carried on in his voluntary absence.[13] Again, errors which are considered fundamental and jurisdictional in felonies are not deemed ground of reversal in misdemeanor cases.[14]

It is evidently impossible, then, to set up any definite, objective, "jurisdictional" test; but one fact, it will be observed, seems to stand out clearly. The tendency of the courts to permit waiver and declare rights to be non-jurisdictional depends upon their view of the extent of the State's interest in the preservation of the particular right in question. It is submitted, then, that it is public interest which ultimately governs the courts; that in the last analysis rights attempted to be dispensed with are considered jurisdictional only when their waiver is believed to be unwise from the standpoint of the public.

Accordingly, it seems that the technicalities which now fetter the courts in the administration of criminal justice should give way to the dictates of common sense. Thus in the recent case of *State* v. *Keehn* (Kan. 1911) 118 Pac. 851, the waiver by the prisoner of the presence of the judge at the rendition of the verdict was held not to be reversible error, on the ground that where all the forms have been observed for insuring the authenticity of the verdict, and the accused has been deprived of no opportunity to protect his substantial rights, "no verdict ought to be set aside merely to satisfy the theory regarding the constitution and organization of the court." Surely the supervision of the trial justice and the review of an appellate court are enough to safe-guard the prisoner; and surely what has been called[15] "the great end of punishment," the prevention of future crime, would be more successfully advanced, and the interest of the State in preserving technical privileges would be far outweighed, by the obvious advantages of increasing the quickness and efficiency of the criminal law.

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[8]Comw. *v.* Dailey (Mass. 1853) 12 Cush. 80.

[9]State *v.* Hartley *supra;* Murphy *v.* State (1894) 43 Neb. 34.

[10]See State *v.* Sackett (1888) 39 Minn. 69.

[11]Meredeth *v.* People (1877) 84 Ill. 479; Haverly Mining Co. *v.* Howcutt (1883) 6 Col. 574; State *v.* Hammer (1902) 116 Ia. 284; B. & O. R. R. Co. *v.* Polly *supra.*

[12]Hopt *v.* Utah *supra;* Maurer *v.* People (1870) 43 N. Y. 1; Prine *v.* Comw. (1851) 18 Pa. 103; *contra,* State *v.* Waymire (1908) 52 Ore. 281; and see 5 COLUMBIA LAW REVIEW 476.

[13]State *v.* Way (1907) 76 Kan. 928; Falk *v.* State (1899) 5 App. D. C. 446.

[14]See 6 Criminal Law Magazine 183 *et seq.;* Nomaque *v.* People (1825) 1 Ill. 145.

[15]Hopt *v.* Utah *supra.*